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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BANCO PANAMERICANO, INC., CHIPLEASE, INC., and LEON GREENBLATT,

Petitioners,

v.

CHASTANG LANDFILL, INC., WASTE MANAGEMENT HOLDINGS, INC., CONSORTIUM SERVICE MANAGEMENT GROUP, and JAY A. STEINBERG, CHAPTER 7 TRUSTEE FOR THE ESTATE OF RESOURCE TECHNOLOGY CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a lender with a security interest on all of a debtor's assets entitled to the protections of Section 363(f) of the United States Bankruptcy Code (11 U.S.C. § 363(f)) when a debtor-in-possession or bankruptcy trustee seeks authority from a bankruptcy court to sell such lender's collateral outside the ordinary course of business?

2. Can a debtor-in-possession or a bankruptcy trustee abandon an executory contract pursuant to Section 544 of the United States Bankruptcy Code (11 U.S.C. § 554)?

PARTIES TO THE PROCEEDING

Petitioners are Banco Panamericano, Inc., Chiplease, Inc., and Leon Greenblatt

Respondents are Chastang Landfill, Inc., Waste Management Holdings, Inc., Consortium Service Management Group, and Jay A. Steinberg, Chapter 7 Trustee for the Estate of Resource Technology Corporation.

STATEMENT PURSUANT TO RULE 29.6

Petitioners have no parent corporations and no publicly held company owns 10% or more of the stock of any of the Petitioners.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
TABLE OF APPENDICES	viii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING OF THE PETITION	6
I. REVIEW IS WARRANTED TO ALLOW THE COURT RESOLVE THE ISSUE OF WHETHER A LENDER SECURED BY A BLANKET LIEN OR A FLOATING LIEN ON ALL OF A DEBTOR'S ASSETS IS ENTITLED TO THE PROTECTIONS OF § 363 OF THE CODE.	6

Contents

Page

II. REVIEW IS WARRANTED TO ALLOW THE COURT RESOLVE THE ISSUE OF WHETHER A DEBTOR CAN ABANDON AN EXECUTORY CONTRACT OR UNEXPIRED LEASE PURSUANT TO SECTION 554 OF THE CODE. 12

CONCLUSION 15

TABLE OF CITED AUTHORITIES

Page

Cases

In re Fidelity Standard Mortgage Corp., 839 F.2d 1517 (11th Cir. 1988) 11

In re Argonaut Financial Services, Inc., 164 B.R. 107 (N.D. Cal. 1994) 13

In re Bernard, 69 B.R. 13 (Bankr. D. Haw. 1986) 14

In re DeVlieg, Inc., 1993 WL 248205 (N.D. Ill. 1993) 13

In re Filtercorp, Inc., 163 F.3d 570 (9th Cir. 1998) ... 8

In re First Wellington Canyon Associates, 1989 WL 106838 11

In re Smith's Homes Furnishings, 265 F.3d 959 (9th Cir. 2001) 8

In the Matter of O'Connor, 258 F.3d 392 (5th Cir. 2001) 14

In the Matter of Resource Technology Corporation, 430 F.3d 884 (7th Cir. 2005) 1

In re Lubrizol Enterprises v. Richmond Metal Finishers, 756 F.2d 1043 (4th Cir. 1985), *cert. denied*, 475 U.S. 1057 (1986) 11

Cited Authorities

Page

In re Mellon Bank, N.A. v. Dick Corp., 351 F.3d 290 (7th Cir. 2003) 8

In re N.L.R.B. v. Bildisco and Bildisco, 465 U.S. 513 (1984) 11

In re Reves v. Ernst & Young, 507 U.S. 170, 113 S. Ct. 1163, 122 L. Ed. 525 (1993) 8

In re UNI Imports, Inc. v. Aparacor, 978 F.2d 984 (7th Cir. 1992) 8

Statutes

Section 363(c) of the Bankruptcy Code 10

Section 363(f)(3) of the Bankruptcy Code .....*passim*

11 U.S.C. Section 554(c) 14

28 U.S.C. §1254(1). 1

Section 101(37) of the Bankruptcy Code 7

Section 363(f) of the Bankruptcy Code i

Section 365 of the Bankruptcy Code 5, 12

Section 365(d)(4) of the Bankruptcy Code 14

Cited Authorities

Page

Section 554 of the United States Bankruptcy Code ..... *passim*

Title 11, United States Code, Section 365(a) 2

Title 11, United States Code, Section 521(1) 2

Rules

Rule 9019 of the Federal Rules of Bankruptcy Procedure 11

Other Authorities

Mark R. Campbell and Robert C. Hastie, *Executory Contracts: Retention Without Assumption In Chapter 11 – "Ride Through" Revisited*, 19 Am. Bankr. Inst. J. 33 (March 1, 2000) 14

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Seventh Circuit Decided December 9, 2005 ..... 1a

Appendix B — Opinion Of The United States Court Of Appeals For The Seventh Circuit Dated December 9, 2005 ..... 8a

Appendix C — Order Of The United States District Court For The Northern District Of Illinois Dated March 18, 2005 ..... 9a

Appendix D — Judgment Of The United States District Court For The Northern District Of Illinois, Eastern Division Dated March 18, 2005 ..... 16a

Appendix E — Order Of The United States Bankruptcy Court For The Northern District Of Illinois, Eastern Division Dated February 1, 2005 ..... 17a

Appendix F — Order Of The United States Court Of Appeals For The Seventh Circuit Denying Petition For Rehearing Dated January 11, 2006 ... 21a

Petitioners Banco Panamericano, Inc., Chiplease, Inc. and Leon Greenblatt respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *In the Matter of Resource Technology Corporation*, 430 F.3d 884 (7th Cir. 2005). It is reproduced in the Appendix at App. A. The opinion of the District Court is unreported and is reproduced in the Appendix at App. C. The opinion of the bankruptcy court is unreported and is reproduced in the Appendix at E.

STATEMENT OF JURISDICTION

The Court of Appeal's judgment was entered on December 9, 2005. A timely petition for rehearing en banc was filed, and was denied on January 11, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 11 United States Code, Section 363(f)(3)

Use, Sale or Lease of Property

> The Trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if —
>
> * * *

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

Title 11 United States Code, Section 365(a)

Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c) and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

Title 11 United States Code, Section 554

Abandonment of property of the estate

(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(c) Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered at the time of the closing of a case

is abandoned to the debtor and administered for purposes of section 350 of this title.

(d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.

STATEMENT OF THE CASE

Resource Technology Corporation (the "Debtor") was in the business of collecting combustible gas emitted by landfills. The Debtor would then either sell such gas or use such gas to power electrical generators, and then sell the resulting electricity to local utilities. The Debtor conducted these operations at a number of different facilities prior to and during its bankruptcy case.

One of the landfills at which the Debtor conducted business is located in Mount Vernon, Alabama, and commonly referred to as the Chastang Landfill. Pursuant to an agreement with Chastang Landfill, Inc. ("Chastang"), the Debtor had the exclusive right to collect gas from the Chastang Landfill. The Debtor also had a contract with Consortium Service Management Group ("CSMG") to process the gas and sell the gas to a local utility.

The Petitioners are pre-petition and post-petition lenders to the Debtor. The Petitioners held and still hold a security interest on all of the Debtor's assets. The Appellants hold a first priority lien on virtually all of the Debtor's gas collection rights and hard assets generally, and including those located at the Chastang Facility.

The Debtor and Chastang engaged in adversarial litigation during the course of the bankruptcy case, with each side claiming defaults by the other. On December 14, 2004, Gregg Szilagyi, the Chapter 11 Trustee for the Debtor[1], filed a motion seeking authorization to settle with Chastang. Pursuant to the motion and the proposed settlement agreement, the Debtor agreed to terminate the Chastang gas rights agreement and transfer to Chastang the Debtor's interest in certain hard assets at the Chastang facility. The Debtor and Chastang agreed to provide mutual releases of claims, with the Debtor dismissing its adversary complaint against Chastang.

The Petitioners opposed the settlement between the Debtor and Chastang. The Petitioners believed that the settlement would substantially destroy their collateral at the Chastang Facility, and would not otherwise benefit the Estate. To advance their view, the Petitioners submitted a competing offer to the Trustee under which the Trustee would seek to cause the Debtor to abandon the gas rights agreements, leases, equipment and other assets relating to the Chastang Facility, pursuant to Section 554 of the United States Bankruptcy Code (the "Code"), to Resource Technology Corporation unaffected by the bankruptcy proceedings. In exchange for the abandonment, the Petitioners agreed to transfer to the Chapter 11 Trustee $200,000, release $1.6 million in administrative claims and $400,000 in pre-petition secured claims, and provide other consideration.

---

1. The Debtor's bankruptcy case has been converted to a liquidation case under Chapter 7 of the United States Bankruptcy Code. The Chapter 11 Trustee was dismissed from the proceedings. Jay A. Steinberg was appointed interim Chapter 7 Trustee, and is now the Chapter 7 Trustee for the Debtor.

The Chapter 11 Trustee indicated his preference for and his desire to accept the Petitioners' settlement offer over the Chastang Settlement, but the Bankruptcy Court refused to authorize the Trustee to enter into settlement with the Petitioners. The Bankruptcy Court ruled that the Bankruptcy Code did not allow for abandonment of the executory contracts such as the gas rights agreement with Chastang. The Bankruptcy Court found that Section 365 and Section 554 of the Code deal with the same issue and are in conflict. The Bankruptcy Court found that the specific language of Section 365 dealing with executory contracts overrides the general language of abandonment of Section 554.

In response to the Petitioners' argument that the Debtor had no pecuniary interest in the Chastang contracts, and therefore the Trustee was barred from disposing of the collateral under Section 363(f) of the Code, the Court ruled that the evidence showed the recovery to be received by the Debtor under the Chastang Settlement exceeded any potential recovery the Petitioners could achieve in litigation outside the bankruptcy court.

The Petitioners appealed the bankruptcy court's decision to the United States District Court for the Northern District of Illinois. The District Court affirmed the bankruptcy court's ruling.

The Petitioners appealed to the Seventh Circuit Court of Appeals. The Seventh Circuit affirmed the lower courts' decisions. The court labeled the Petitioners' security interest in the Debtor's assets a "floating lien," and ruled that holders of such floating liens are not entitled to the protections of Section 363(f), as that section "deals with liens on specific assets." The panel also ruled that an executory contract is

not subject to abandonment by a debtor pursuant to Section 554 of the Code. The Seventh Circuit subsequently denied a petition for rehearing en banc by the Petitioners.

REASONS FOR GRANTING OF THE PETITION

The questions presented in this Petition are important questions of federal law that have not been, but should be, settled by this Court. The question of whether secured lenders with blanket liens on a debtor's assets are entitled to the protections of § 363(f) has far-reaching implications for the future availability of pre-petition and critical post-petition lending to distressed companies. The question of whether executory contracts can be abandoned pursuant to § 554 of the Code is an issue of great importance for the ability of debtors and trustees to maximize recovery for creditors.

I. REVIEW IS WARRANTED TO ALLOW THE COURT RESOLVE THE ISSUE OF WHETHER A LENDER SECURED BY A BLANKET LIEN OR A FLOATING LIEN ON ALL OF A DEBTOR'S ASSETS IS ENTITLED TO THE PROTECTIONS OF § 363 OF THE CODE.

The 7th Circuit effectively ruled that lenders such as the Petitioners, with a lien on all of a debtor's assets, are not entitled to the protections of § 363(f) of the Code. § 363(f)(3) bars a creditor from selling assets outside the ordinary course of business if the sale will not generate funds sufficient to satisfy all liens against the property. The Court of Appeals ruled that § 363(f)(3) only applies to liens on specific assets. Liens on all of a debtor's assets, such as that held by the Petitioners, which the Court of Appeals termed a "floating lien," are not entitled to the protections of § 363(f)(3),

according to the Court of Appeals. The only protections accorded such lenders, under the Court of Appeals' ruling, is the requirement that the sale be beneficial to the estate.

The 7th Circuit's interpretation of § 363(f)(3) severely restricts the protections of that section, to the great detriment of those persons and entities willing to lend to distressed or bankrupt companies. The 7th Circuit cites no authority for this proposition. No other federal appellate court has addressed this issue, for the likely reason that the 7th Circuit's interpretation is not a reasonable one. The idea that the added protection of a blanket lien on all of a debtor's assets, as opposed to liens on specific assets, could operate to reduce the protections afforded a secured creditor under the Code is antithetical to the concept of secured transactions and the Code's respect for the bargained for protections of secured creditors.

The 7th Circuit's ruling also conflicts with the unambiguous language of the Code. Section 363(f)(3)'s bar of sale of property of the estate free and clear applies to *any* interest that is a lien. Section 101(37) of the Code defines "lien" as "charge against or interest in property to secure payment of a debt or performance of an obligation." The Petitioners' liens, including liens created by order of the Bankruptcy Court to secure post-petition financing to the debtor-in-possession, expressly provide the Petitioners

> valid and perfected security interests, in and upon all of the assets of the Debtor, whether acquired prior to or after the filing of the petition commencing the Debtor's chapter 11 case, whether now owned and existing or hereafter acquired, created or arising and all product and

> proceeds thereof . . . including but not limited to, all of the Debtor's accounts, goods . . . landfill gas rights and collection facilities leases . . .

(March 3, 2000 Financing Order, ¶7.)

"In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *Reves v. Ernst &* Young, 507 U.S. 170, 177, 113 S. Ct. 1163, 1169, 122 L. Ed. 525 (1993) quoting *United States v. Turkette*, 452 U.S. 576, 580, 101 S. Ct. 2524, 2527, 69 L. Ed. 246 (1981). Section 363(f)(3) is unambiguous in its inclusion of any interest that is a lien. Section 101(37) is unambiguous in its broad definition of "lien". Neither section of the Code lends any support to an interpretation that would limit the application of the section to certain types of liens. The Court of Appeals cited to no case law or other authority for support for its interpretation.

The Court of Appeals also erred in finding that Petitioners' lien on the Chastang assets involved a floating lien. Decisions by the 7th Circuit and other Circuit Courts make clear that the term "floating lien" is intended to apply to constantly shifting inventory and receivables that are secured by an after-acquired property clause in a security agreement. *See Mellon Bank, N.A. v. Dick Corp.*, 351 F.3d 290 (7th Cir. 2003); *In re Smith's Homes Furnishings*, 265 F.3d 959 (9th Cir. 2001); *UNI Imports, Inc. v. Aparacor*, 978 F.2d 984 (7th Cir. 1992); *In re Filtercorp, Inc.*, 163 F.3d 570 (9th Cir. 1998).

The gas underlying the gas rights agreement may shift, but the right to the use of gas, of which the gas is only a component is a constant. While the Petitioners do hold a floating lien on the Debtor's accounts receivable and inventory, the Petitioners also hold a standard lien on the Debtor's fixed, non-malleable assets. The collateral at issue in the Chastang Settlement, the gas rights agreement relating to the Chastang Facility, falls into the latter category. As noted above, the Financing Statement expressly provides the Petitioners with a lien on the Debtor's landfill gas rights and collections facilities leases; precisely the type of agreement at issue in the Chastang Settlement. The Chastang Agreement existed prior to the bankruptcy filing and the Financing Order, and therefore does not invoke the after-acquired clause that is so critical to a floating lien. The Chastang Agreement did not represent inventory or receivables, nor was it shifting or changing collateral. Even if the 7th Circuit was correct in ruling that Section 363(f) applies only to liens on specific assets and not to floating liens, the Petitioners were entitled to the protection of Section 363(f)(3).

Subsumed in the issue regarding the interpretation of § 363(f)(3) is the indication by the Court of Appeals that the type of transaction involved in the Chastang Settlement was an ordinary course transaction. While discussing Section 363(f), the 7th Circuit stated "a borrower remains free to transact in the course of its business, and if it sells gas—or settles a lawsuit—the proceeds become subject to the lien." The necessary finding by the Court of Appeals is that the settlement with Chastang was in the ordinary course of business of the Debtor.

The Court of Appeals is mistaken. The Chastang settlement was not made in the ordinary course of business

of the Debtor. Clearly, the Debtor was not in the business of settling lawsuits; rather its business concerned operating under landfill gas agreements, such as the Chastang Landfill Gas Agreement. The effect of the Chastang Settlement was 1) termination of the Chastang Landfill Gas Agreement, an executory contract; 2) release of claims by the Debtor and Chastang; 3) payment to the Debtor of $75,000 in exchange for the contract termination and release; 4) modification of the automatic stay to allow Chastang to take possession of the plant equipment; and 5) dismissal of the adversary proceeding, in which the Debtor had sought injunctive relief and monetary damages. A settlement of this nature cannot in any way be characterized as in the course of business of any debtor.

§ 363(c) of the Code allows that a trustee operating the debtor's business may enter into transactions and use property of the estate in the ordinary course of business without notice or a hearing. Conversely, Rule 9019 of the Federal Rules of Bankruptcy Procedure provides for court approval of a compromise or settlement, upon a motion by the trustee and following notice to creditors and a hearing. If settlement of a claim was in the ordinary course, Rule 9019 would not require notice and a hearing. Whether the settlement evidences the Trustee's business judgment is in question, since the Trustee's expressed his preference for the Petitioners' offer, which the Bankruptcy Court prevented him from accepting.

Part of the Chastang Settlement involved the rejection of the Chastang Gas Rights Agreement. § 365 of the Code allows a trustee to reject an executory contract, subject to court approval. Case law demonstrates that the trustee must show that rejection will benefit the estate.

> In determining whether rejection of the lease would be advantageous to the estate, the court must apply the business judgment test. See, e.g., *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 523 (1984). Under this test, the debtor's business judgment on whether to reject an executory contract must be accorded deference unless shown that the bankrupt's decision was taken in bad faith or in gross abuse of the bankrupt's retained discretion. *Lubrizol Enterprises v. Richmond Metal Finishers*, 756 F.2d 1043, 1047 (4th Cir. 1985), cert. denied, 475 U.S. 1057 (1986). Nevertheless, rejection will not be permitted if there is no showing of benefit to the estate or if the risk of harm to the other party to the contract will be disproportionate to the benefit to the estate.

In re First Wellington Canyon Associates, 1989 WL 106838.

Therefore, rejection of an executory contract is not an ordinary course transaction that a trustee can undertake without court approval.

As part of the Chastang Settlement, the Trustee transferred Estate property, including certain personal property at the Chastang Landfill. The transfer of Estate property as part of a settlement is not within the ordinary course of business of a debtor. *In re Fidelity Standard Mortgage Corp.*, 839 F.2d 1517 (11th Cir. 1988). This is further demonstrated by the fact that the Trustee filed a motion pursuant to Rule 9019 seeking authority to enter into the settlement.

The error by the Court of Appeals does not constitute a mere misunderstanding of the facts of the matter, with limited impact beyond this case. Rather, the ruling stands as precedent that may materially impact the manner in which vital lending is made available to troubled or bankrupt entities. The 7th Circuit's ruling carries the danger that lenders may shy away from providing otherwise available financing due to the apparent ability of Debtors in the 7th Circuit to sell assets free and clear of liens without satisfying § 363(f)(3).

II. REVIEW IS WARRANTED TO ALLOW THE COURT RESOLVE THE ISSUE OF WHETHER A DEBTOR CAN ABANDON AN EXECUTORY CONTRACT OR UNEXPIRED LEASE PURSUANT TO SECTION 554 OF THE CODE.

The settlement offered by the Petitioners to the Debtor, as an alternative to the Chastang Settlement, required the Debtor to abandon the Chastang gas rights agreement under Section 554 of the Code. The Bankruptcy Court found that an executory contract, such as the gas rights agreement, could not be abandoned under Section 554, and could only be administered through assumption or rejection under Section 365. The Court of Appeals agreed that the Debtor could not abandon the Chastang contract under Section 554 of the Code. However, the Court of Appeals did not focus on the alleged conflict between Section 554 and Section 365; rather, it found that 1) while a contract right might be property of the estate, performance obligations under a contract are not property of the estate, and 2) if the contract right was abandoned, it would disappear, along with the Petitioners' security interest. The Court of Appeals stated "[a] right that is abandoned is gone. Once [the Debtor's] right to harvest

gas disappears, the entitlement reverts to the landfill's owner—Chastang."

The Court of Appeals' ruling shows a fundamental misunderstanding of the concept of abandonment under § 554. The 7th Circuit appears to have applied a common law/ state law view of abandonment of a contract, i.e. a rejection of a contract which would constitute a breach and a termination of the contract. Abandonment under § 554 is a different type of animal. Abandonment of property of a bankrupt estate merely passes the property to the pre-petition debtor unaffected, outside the purview of the bankruptcy court and the administration of the bankrupt estate. Abandonment of a contract right under § 554 would not terminate the contract or make it "vanish in a puff of smoke." It would merely pass the contract back to the original contracting party, the pre-petition debtor, and would enable the Petitioners to take any available steps to foreclose on their security interest, free of the automatic stay and other constrictions of the bankruptcy court's administration.

All the relevant case law addressing the issue suggests that a trustee can abandon executory contracts belonging to the bankruptcy estate. *See In re DeVlieg, Inc.*, 1993 WL 248205 (N.D. Ill. 1993) (an executory contract remains in force in a chapter 11 reorganization until it is rejected and unless rejected, it passes with other property of the debtor to the reorganized corporation) (citations omitted); *In re Argonaut Financial Services, Inc.*, 164 B.R. 107 (N.D. Cal. 1994) (secured creditors with security interest in debtor's ground lease were granted time to bring a motion under Section 554 to compel the abandonment of the ground lease by the estate such that the secured creditors could pursue

their security interests in the lease); *In re Bernard*, 69 B.R. 13 (Bankr. D. Haw. 1986) (a security interest holder in debtor's leasehold could bring a motion for abandonment prior to the running of the sixty day period to avoid the operation of Section 365(d)(4)); *see also, In the Matter of O'Connor*, 258 F.3d 392 (5th Cir. 2001) (executory contracts which are neither assumed nor rejected pursuant to a chapter 11 plan pass through the bankruptcy proceeding to the pre-bankruptcy debtor unaffected by the bankruptcy proceedings).

Abandonment of executory contracts in the chapter 11 context is often implied by way of a "ride-through." The term "ride-through" refers to executory contracts which are neither assumed nor rejected during the course of a chapter 11 case and therefore such contracts "ride-through" the bankruptcy unaffected and revest with the reorganized debtor upon the closing of the case. *See* 11 U.S.C. § 554(c) ("any property [of the estate] not otherwise administered at the time of the closing of a case is abandoned to the debtor); *see also* Mark R. Campbell and Robert C. Hastie, *Executory Contracts: Retention Without Assumption In Chapter 11 – "Ride Through" Revisited*, 19 Am. Bankr. Inst. J. 33, 34-35 (March 1, 2000). (See cases cited therein.)

Contrary to the 7th Circuit's ruling, if the gas rights agreement is abandoned, it remains subject to the Petitioners' lien. The only difference is that it is in the hands of the pre-petition debtor. Any rights of performance that the estate had remain in place in the pre-petition debtor. Any rights or claims that Chastang had with regard to any breaches also remain in place. The Petitioners' right to foreclose their security interest in the gas rights agreement would survive abandonment.

The effects of the 7th Circuit's ruling are potentially far reaching. By foreclosing the possibility of abandonment of executory contracts, the Court of Appeals has limited the ability of a debtor or trustee to effectively reorganize under the guidance of the bankruptcy courts. The Chapter 11 Trustee in the present case desired to accept the Petitioners' alternate settlement. It provided a better deal for the estate and the greater possibility of distribution to unsecured creditors. The Bankruptcy Court's ruling, however, as affirmed by the district court and the Court of Appeals, prevented the trustee from maximizing the administration of the Debtor's assets.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED DECEMBER 9, 2005

In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 05-1779

In the Matter of:

RESOURCE TECHNOLOGY CORPORATION
(by Gregg E. Szilagyi, Trustee),

Debtor-Appellee.

Appeal of:

Leon Greenblatt; Banco Panamericano, Inc.;
and Chiplease, Inc.

Argued November 7, 2005—Decided December 9, 2005

Before POSNER, EASTERBROOK, and WOOD, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Resource Technology Corporation turns garbage into money by collecting methane from landfills, reducing the emission of a greenhouse gas in the process. It either sells the methane or burns the gas to make electricity. Installing methane-collection systems is tricky, however, and Resource Technology landed in bankruptcy because its outlays exceed its revenues from harvested methane. This appeal concerns one of its money-losing ventures.

Appendix A

In 1996 Resource Technology agreed with Chastang Landfill, Inc., in Mount Vernon, Alabama, to build a gas-collection system. Consortium Service Management Group contracted to buy the scavenged gas, which it planned to purify and resell to a local utility. By 1999 the collection system had not been completed, and Chastang terminated the contract. Litigation ensued and was settled: Resource Technology promised to finish the system by September 2002 and gave Chastang a promissory note to cover costs it had incurred. When that deadline passed with the system still not operable, Chastang again terminated the agreement and Resource Technology, by then in bankruptcy, filed an adversary proceeding. A second settlement was reached and a final deadline for completion set: March 31, 2003. That deadline, too, passed with the system unfinished, and another adversary proceeding followed. A third settlement was reached, this time with the Trustee in bankruptcy. Chastang and Consortium Service Management agreed to release Resource Technology from its obligation to finish the system, to forgive the promissory note, to abandon any claim to damages, and to pay $75,000; in exchange the Trustee agreed to give up Resource Technology's right to the methane.

Before the bankruptcy court approved this settlement, Resource Technology's principal creditors (holding about $40 million in debt claims, secured by a floating lien on the firm's assets) made the Trustee a better offer. In exchange for a right to complete the system and collect the methane, the lenders offered to pay the estate $200,000 and release $2 million of their debt claims; they promised to indemnify the estate for any sums it should be required to pay on account of delay in completing the system. The Trustee preferred this

offer to Chastang's but could not see how to implement the proposal, for the contract between Resource Technology and Chastang has an anti-assignment clause, and at all events had been terminated because of Resource Technology's enduring delinquency.

The lenders proposed that the right to collect the gas could be transferred to them if the Trustee were to abandon the executory portion of the contract between Resource Technology and Chastang. The lenders then could use their security interest to step into Resource Technology's position. Bankruptcy Judge Wedoff concluded, however, that an executory contract cannot be abandoned under 11 U.S.C. § 554; the debtor's choices are limited to assumption or rejection under 11 U.S.C. § 365—and, once a contract has been assumed (as this one was), to performance or breach. Abandonment would just break the debtor's promise and support a claim for damages; it could not transfer Resource Technology's rights to the lenders. Judge Wedoff therefore approved the settlement with Chastang, and District Judge Kennelly affirmed. 2005 WL 2588860, 2005 U.S. Dist. LEXIS 4101 (N.D.Ill. March 18, 2005).

The lenders' appeal has been met at the outset with a contention that the litigation is moot. All requests for a stay were denied, and the settlement between Chastang and the Trustee has been consummated. The $75,000 has been paid; Chastang's claims have been released; someone else has taken over completion of the system and the collection of gas. Yet why should this end the controversy? A case is moot when no further judicial relief is possible. See *Church of Scientology v. United States*, 506 U.S. 9, 113 S.Ct. 447, 121

L.Ed.2d 313 (1992). By that standard, this dispute is live. A court could order the Trustee to return Chastang's money, reinstate its claims for damages and payment on the note, and direct Chastang to deliver the gas to the lenders. Unscrambling a transaction may be difficult, but it can be done. No one (to our knowledge) thinks that an antitrust or corporate-law challenge to a merger becomes moot as soon as the deal is consummated. Courts can and do order divestiture or damages in such situations. Perhaps Chastang has in mind not mootness but judicial reluctance to upset legitimate reliance interests. See 11 U.S.C. § 363(m); *In re UNR Industries, Inc.*, 20 F.3d 766 (7th Cir.1994). Appellees do not contend, however, that anyone who has relied on the settlement would be left in the lurch; the lenders could be ordered to compensate the firm that completed the system and collects the gas. So we must resolve the merits.

The lenders want us to decide whether § 365 (which addresses the assumption or rejection of executory contracts) supersedes § 554 (which authorizes debtors to abandon assets). They contend that these sections of the Bankruptcy Code may be reconciled. Maybe so, see *Precision Industries, Inc. v. Qualitech Steel SBQ*, LLC, 327 F.3d 537, 544 (7th Cir.2003), but that's not the real issue. Suppose that § 554 were the only part of the Code with any relevance. Still, the creditors would face two problems: first, a debtor may abandon assets but not contractual duties; second, abandonment would end the business deal rather than pass any rights through to the lenders.

Section 554(a) provides: "After notice and a hearing, the trustee may abandon any property of the estate that is

burdensome to the estate or that is of inconsequential value and benefit to the estate." The phrase "property of the estate" is not defined in the Code; courts look to state law to determine what kind of "property" an estate possesses. See *Butner v. United States*, 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979). The normal use of § 554 is to give up an interest in real estate that is burdened by a debt so large that the equity value is negligible or negative. That is not its sole use, however. A contract right—say, a right to purchase a parcel of land—usefully may be understood as "property" for this purpose. States generally deem options and equivalent entitlements to be varieties of property. But does either Illinois or Alabama (the two states involved in the contract between Resource Technology and Chastang) treat a duty of performance under a contract as a property right?

Normally a duty is the opposite of a right. And that's the lenders' main problem. Resource Technology had a duty to complete the gas-collection system; it had a right to collect the gas only after fulfilling that duty. When the lenders asked the Trustee to "abandon" the contract, Resource Technology had not finished the collection system. Abandonment then would have been nothing but breach; and if Resource Technology repudiated its promise (already broken by delay), it would have lost any right to the gas. There was no property interest the Trustee could abandon.

If one were to treat a package of rights and duties as a single property interest, in the way a contract as a whole might be sold (in the absence of an anti-assignment clause), how would abandonment of that package give the lenders any entitlement to the gas? A right that is abandoned is gone.

Appendix A

Once Resource Technology's right to harvest gas disappears, the entitlement reverts to the landfill's owner—Chastang. The lenders seem to think that their security interest would direct the gas to them, free from the anti-assignment clause, but their security is in the contract rather than in the gas. If the contract is abandoned, the security disappears. A contract right in this respect differs from real estate or chattels, which continue to exist even if a given party's stake is abandoned. When a contract terminates, the asset covered by the floating lien vanishes in a puff of smoke. So the bankruptcy judge was right to hold that the lenders' proposal is legally impossible.

Finally we must consider § 363(f)(3), which says that a trustee cannot dispose of a secured party's collateral over objection unless the price realized exceeds the value of the lien. Appellants maintain that this provision forbids the settlement between the Trustee and Chastang. Yet why should we treat the settlement as the disposition of collateral? Section 363(f)(3) deals with liens on specific assets. A floating lien does not attach to particular assets; a borrower remains free to transact in the course of its business, and if it sells gas—or settles a lawsuit—the proceeds become subject to the lien. Out of bankruptcy Resource Technology and Chastang could have settled their dispute without any hindrance from the lenders; a Trustee has the same power in bankruptcy. Creditors that hold floating liens are protected by the requirement that the Trustee's decisions be beneficial to the estate. Judge Wedoff concluded, after a hearing, that this settlement is beneficial. This means that the lenders are better off than they would be if Resource Technology, having failed to complete the system, were exposed to liability on

the note and damages for breach, while losing the right to harvest and sell the gas. Section 363(f)(3) does not block transactions that make creditors better off. These lenders are not as well off as they would be if they could harvest the methane, but as we have explained that is not an available option.

AFFIRMED.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED DECEMBER 9, 2005

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: December 9, 2005

BEFORE: Honorable RICHARD A. POSNER, Circuit Judge

Honorable FRANK H. EASTERBROOK, Circuit Judge

Honorable DIANE P. WOOD, Circuit Judge

No. 05-1779

IN RE:

RESOURCE TECHNOLOGY CORPORATION,

Debtor-Appellee

APPEAL OF: LEON GREENBLATT,
BANCO PANAMERICANO, INCORPORATED
and CHIPLEASE INCORPORATED,

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS DATED MARCH 18, 2005

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge
or Magistrate Judge:
Matthew F. Kennelly

CASE NUMBER:
05 C 1508

DATE:
3/18/2005

CASE TITLE:
In Re: Resource Technology Corp. (Chastang settlement)

DOCKET ENTRY TEXT:
For the reasons stated below, the Court affirms the decision of the Bankruptcy Court. The Clerk is directed to enter judgment affirming the Bankruptcy Court's decision.

STATEMENT

In 1996, Resource Technology Corp. entered into a contract with the predecessor of Chastang Landfill, Inc., the operator of an Alabama landfill, in which RTC promised to install and operate a system for collecting and converting methane gas generated from the decomposition of landfill waste. Chastang terminated the contract in 1999 due to RTC's alleged failure to perform, and RTC filed suit. While the suit

was pending, an involuntary bankruptcy proceeding was filed against RTC. To resolve the Chastang lawsuit, RTC agreed to install and operate a gas conversion system by September 2002. The settlement included RTC's execution of a promissory note payable to Chastang to cover costs incurred to complete the system. RTC did not meet the deadline, Chastang terminated the settlement agreement, and RTC filed an adversary proceeding against Chastang in the bankruptcy case. That action was settled, with RTC agreeing to a final deadline of March 31, 2003 to complete the gas conversion system.

RTC did not meet the March 2003 deadline, and Chastang against terminated its agreement with RTC. RTC filed a second adversary proceeding to challenge the termination. After a bankruptcy trustee was appointed, he amended the complaint, alleging that RTC's default should be excused because Chastang had improperly interfered with RTC's ability to perform. The trustee, however, concluded that RTC's legal position was weak, in part because RTC had also defaulted on the promissory note, which constituted a separate default under the agreement with Chastang. And if it lost the case, the debtor would owe Chastang nearly $545,000 under the promissory note, plus attorney's fees of at least $200,000 and lost royalties, and it would remain obligated to perform under the contract. Chastang and CSMG, the company that RTC had hired to install and operate the gas conversion system, proposed a settlement under which Chastang would release its claims and CSMG would pay the estate $75,000 and withdraw the $6 million administrative claim that it had filed in the bankruptcy case. In return, the estate would release any rights it had to collect gas from the

landfill. The trustee asked the bankruptcy court to approve the proposed settlement.

Several lenders, the appellants in this case, had provided some $40 million of pre-petition and post-petition financing to RTC, in return for a security interest in all the property of the estate. The lenders opposed approval of the settlement, arguing that it was not in the estate's best interests because it would result in a destruction of the lender's collateral and the value of the estate's interest in the gas collection rights. The lenders made an offer to the trustee in which they proposed to pay the estate $200,000 and release $1.6 million in administrative claims and $400,000 in pre-petition secured claims, in return for abandonment of the estate's rights vis-a-vis the Chastang landfill and transfer of those rights to the lenders, subject to the claims of all other creditors and parties in interest.

The bankruptcy court heard evidence regarding the underlying dispute and the proposed settlement. The trustee reported that he would recommend approval of the lenders' proposed deal, but only if the court considered its terms legal under the Bankruptcy Code. The bankruptcy court found that the lenders' proposal required the abandonment and assignment of an executory contract, which the court concluded was an unavailable form of relief under the Bankruptcy Code. The court also found that the trustee's position in the Chastang litigation was "very weak" and its likelihood of prevailing "extraordinarily remote." It concluded that the settlement proposed by Chastang and CSMG represented an excellent outcome for the estate. The court therefore approved the proposed settlement.

Appendix C

The lenders have appealed, making two arguments. First, they argue that the bankruptcy court erred in approving the Chastang settlement over the objection of a secured creditor that had made a better offer. Second, they argue that the court erred in approving the disposition of the estate's Chastang assets before determining that the estate actually held a pecuniary interest in those assets. The bankruptcy court's decision is reviewed on appeal for abuse of discretion. *See In re Irvin*, 950 F.2d 1318, 1320 (7th Cir.1991); *In re Chung King, Inc.*, 753 F.2d 547, 549 (7th Cir.1985).

The second issue raised by the lenders concerns the appropriateness of approving the settlement before making a definitive determination as to whether the estate had a pecuniary interest in the collateral. Essentially the lenders' argument is that the value of the collateral did not exceed the lenders' interest and that it was inappropriate for the trustee to be disposing of property that belonged to the lenders. *See* 2/1/05 Tr. 186. In light of that argument by the lenders, the bankruptcy court required the trustee to meet a higher standard of proof for approval of the settlement than would otherwise apply. *Id.* The court concluded that the trustee had met that burden, stating that the evidence that the contract had terminated was "overwhelming" and that the $75,000 that the estate would receive—and that the lenders could claim belonged to them as proceeds of their collateral—was "greater relief than [the lenders] would be able to obtain in litigation." *Id.* 186-87.

In their appeal brief, the lenders simply repeat, without elaboration or explanation, their argument that it was inappropriate to approve the settlement before making a

definitive determination that the estate had equity in the Chastang assets. Lenders' Brief at 9-10. They offer no challenge to the bankruptcy court's considered determination that the cash that the estate would receive under the settlement was far more than could be obtained in litigation. Under the circumstances, there is no basis for this Court to overturn that finding by the bankruptcy court.

The bankruptcy court's decision to reject the lenders' offer was premised upon its determination that the acceptance of the offer required "abandonment" of the estate's interest in an executory contract, a form of relief that the court concluded was unavailable under the Bankruptcy Code. The lenders argue that this was an error of law. The Court disagrees.

Abandonment of property with inconsequential value is authorized under section 554 of the bankruptcy code. This is a general provision of the Code that the lenders contend covers all types of property held by an estate, including executory contracts. But "[h]owever inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'" *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-29 (1957) (quoting *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932)). A different provision of the code, section 365, governs how the estate deals with executory contracts, allowing the trustee to assume or reject them. Assumption of a contract requires the trustee to show that the estate can cure existing defaults and give

assurances of future performance; assumption places the estate in the shoes of the debtor and makes the contract obligations priority administrative expenses. *See In re Resource Technology Corp.*, 254 B.R. 215, 221 (Bankr.N.D. Ill.2000). If the trustee wishes to assign an assumed contract, the assignee must provide adequate assurance of future performance. *Id.* The alternative to assumption of an executory contract is its rejection. In the event of a rejection, the contract is deemed breached, and the other party is given a non-priority claim against the estate. *Id.*

Because the Code includes a specific provision focusing on executory contracts, this Court agrees with the bankruptcy court that it is inappropriate to construe section 554 to permit abandonment of such contracts without regard to section 365. When an executory contract is involved, "abandonment" also affects the rights of the other contracting party. Section 365, among other things, takes account of those rights by providing the other contracting party with certain protections. Applying section 554 to an executory contract would undercut these protections.

Finally, as Chastang notes in its brief, the Code's provision regarding executory contracts bars a trustee from assigning an executory contract—part of the settlement proposed by the lenders—if the other contracting party is excused under the law from accepting performance from or rendering performance to an entity other than the debtor. 11 U.S.C. § 365(c). Such was the case here; as Chastang points out, the agreements between RTC and Chastang barred RTC from assigning its interests without first obtaining Chastang's consent.

Appendix C

The lenders offer no other challenge to the bankruptcy court's determination that the Chastang settlement was in the best interests of the estate. For the reasons stated above, the Court affirms the bankruptcy court's ruling. The Clerk is directed to enter judgment affirming the decision of the bankruptcy court.

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MARCH 18, 2005

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 05 C 1508

In Re: Resource Technology

v.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered,

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered affirming the Bankruptcy Court's decision.

Michael W. Dobbins, Clerk of Court

/s/ Olga Rouse, Deputy Clerk

Date: 3/18/2005

APPENDIX E — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED FEBRUARY 1, 2005

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Chapter 11

Case No. 99 B 35434

Hon. Eugene R. Wedoff

In re:

RESOURCE TECHNOLOGY CORPORATION,

Debtor.

ORDER APPROVING SETTLEMENT AGREEMENT BETWEEN AND AMONG GREGG E. SZILAGYI, TRUSTEE FOR RESOURCE TECHNOLOGY CORPORATION, CHASTANG LANDFILL, INC., AS ASSIGNEE AND SUCCESSOR TO TRANSAMERICAN WASTE INDUSTRIES, INC., WASTE MANAGEMENT HOLDINGS, INC. AND CONSORTIUM SERVICE MANAGEMENT GROUP

This matter coming before the Court on the Motion of the Chapter 11 Trustee, Gregg E. Szilagyi ("Trustee"), for Entry of an Order (1) Approving the Settlement Agreement, (2) Modifying The Automatic Stay and (3) Granting Other Related Relief, with due and sufficient notice having been given, and the Court having considered the record of these

proceedings to date; and the Court being otherwise fully advised in the premises, and good and sufficient cause otherwise appearing,

IT IS HEREBY ORDERED and found that:

1. The motion is granted.

2. The Settlement Agreement was made and entered into in good faith, and this order adopts and incorporates the terms and conditions of that Agreement herein.

3. The Settlement Agreement is approved.

4. The Modified Chastang Landfill Gas Agreement (the December 23, 1996 "Original Agreement" as modified and amended by (1) the January 24, 2002 "Amended Agreement (consisting of an amendment and settlement agreement of that date) and (ii) the January 17, 2003 settlement agreement) is deemed to be terminated as of June 25, 2003.

5. The agreement between CSMG and RTC is hereby terminated.

6. All amounts due and owing of any kind or nature by RTC and the Bankruptcy Estate under the Promissory Note and Security Agreement both dated January 30, 2002 and referenced in the Modified Chastang Landfill Gas Agreement are deemed satisfied, forgiven and resolved in full by the Settlement Agreement and this Order.

7. CSMG shall pay to the Trustee $75,000 within thirty days of the date of this Order.

8. Chastang and WMH shall have no administrative expense claim, general unsecured claim, or other claim against the RTC bankruptcy estate ("Bankruptcy Estate") and all such claims shall be deemed withdrawn with prejudice and disallowed.

9. CSMG shall have no administrative claim, general unsecured claim, or other claim against the Bankruptcy Estate, and any and all such claims shall be deemed satisfied, resolved and or withdrawn with prejudice and disallowed.

10. Ownership of any and all property related to the gas collection system and all appurtenant equipment (but not including the scrubber plant) is and shall become vested in Chastang free and clear of any and all liens, claims, encumbrances or security interests granted by the Debtor, the Trustee or the Bankruptcy Estate (except those granted to Chastang, WMH and CSMG), and any and all covenants, rights and remedies created by the Modified Chastang Landfill Gas Agreement, including, without limitation, those covenants, rights and remedies subject to collateral assignment, are terminated, except that the components comprising the scrubber plant arc the property of CSMG.

11. The terms of this Court's February 1, 2002 Agreed Order are hereby affirmed and the automatic stay under Section 362 of the Bankruptcy Code remains vacated to allow Chastang and/or WMH to take all action to retain possession of all equipment comprising the gas collection system (but

not including the scrubber plant) to the exclusion of all others, and to do any and all things to implement the provisions of this Order.

12. The automatic stay under Section 362 of the Bankruptcy Code is hereby modified to permit CSMG to take any and all action to retain possession and exercise control over the scrubber plant and to do any and all things to implement the provisions of this Order. Nothing in this Order, however, in any way affects or modifies any rights, contractual or otherwise, existing between CSMG and Chastang with regard to access to the property or operation and removal of the scrubber plant.

13. The Trustee is hereby granted the authority to, and shall, take all actions necessary to implement this Order and the Settlement Agreement, including terminating permits, licenses or contracts entered into by RTC with respect to the Chastang Landfill.

DATED: 2-1-05

ENTERED:

By: s/ Eugene R. Zedoff
United States Bankruptcy Judge

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED JANUARY 11, 2006

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

January 11, 2006

Before

Hon. RICHARD A. POSNER, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. DIANE P. WOOD, Circuit Judge

No. 05-1779

In the Matter of:

RESOURCE TECHNOLOGY CORPORATION
(BY GREGG E. SZILAGYI, TRUSTEE),

Debtor-Appellee.

APPEAL OF:

LEON GREENBLATT; BANCO PANAMERICANO, INC.; AND CHIPLEASE, INC.

Appendix F

ORDER

Appellants filed a petition for rehearing and rehearing en banc on December 23, 2005. No judge in regular active service has requested a vote on the petition for rehearing en banc,* and all of the judges on the panel have, voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Judge Williams did not take part in the consideration of this matter.